United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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76-1113

ORIGINAL

To be argued by
FREDERICK P. HAFETZ

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

CARMEN GILL a/k/a CARMEN ESTRADA-RESTREPO and LIBARDO GILL a/k/a RAMIRO ESTRADA,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York.

BRIEF FOR DEFENDANTS-APPELLANTS

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BRIEF FOR DEFENDANT-APPELLANTS CARMEN GILL a/k/a CARMEN ESTRADA-RESTREPO and LIBARDO GILL a/k/a RAMIRO ESTRADA

PRELIMINARY STATEMENT

Carmen Gill a/k/a Carmen Estrada-Restrepo and Libardo Gill a/k/a Ramiro Estrada* appeal from judgment of conviction entered against them on March 1, 1976 after a jury trial before the Honorable John M. Cannella in the United States District Court for the Southern District of New York. Each was sentenced to ten years imprisonment to be followed by five years special parole, and additionally to fines of $20,000.00.

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* The true names of appellants are, respectively, Carmen Estrada and Ramiro Estrada. However, since they are referred to in the indictment and the trial testimony as Carmen Gill and Libardo Gill, for convenience, they will be referred to in this brief as Carmen Gill and Libardo Gill.

The indictment, 75 Cr 429, filed April 30, 1975, charged defendants Carmen and Libardo Gill, together with thirty-six other defendants, in two separate counts, with conspiracy to violate the narcotics laws [21 U.S.C. §§846 and 963]. A third count charged two of these defendants, but not the Gills, with unlawful use of firearms [18 U.S.C. §924(c)]. Count two was dismissed by the trial court(T7055).* Defendants Carmen and Libardo Gill were convicted of the conspiracy charged in count one of the indictment.

At the time of sentencing in this case both Carmen and Libardo Gill were already both serving sentences of one year to life imprisonment in New York State prisons pursuant to the pleas of guilty they had each entered in New York State Supreme Court for possession of the same narcotics which the instant indictment, in count one, overt act number ninety, charged that they possessed (S. 96-100, 105-7).** Their sentences in the instant case were made to run concurrently with the prison sentences in the state case.

QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court err in denying the motions by defendants Carmen and Libardo Gill to suppress all

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* Citations preceded by "T" are to the trial transcript.

** Citations preceded by "S" are to the sentencing minutes.

evidence obtained by a search of their apartment?

2. Did the trial court err in denying the motions for judgment of acquittal by defendants Carmen and Libardo Gill by virtue of the fact that the government's proof in this case established multiple conspiracies rather than the single conspiracy charged in the indictment?

STATEMENT OF FACTS

A. Pre-Trial Hearing on Motion to Suppress Evidence.

At approximately 2:30 p.m. on September 30, 1974, New York City police officers Richard Powers and Gerald McQueen went to apartment 3D, 580 Amsterdam Avenue (M71-2,278).* The officers were in the process of investigating the homicide of one Louis Ramos (M73). The officers came to this apartment merely to ask the occupants some questions in connection with that investigation (M73). The officers had no reason to believe that the occupants were suspects in that investigation (M120).

After knocking on the door, the officers heard a noise that sounded like a peephole opening and Powers then

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* Citations preceded by "M" are to the transcript of the pre-trial hearing on the motion to suppress evidence made by Carmen and Libardo Gill.

held up his police shield and stated that it was police at the door (M75). Libardo Gill then opened the door about six to eight inches at which time, Powers again exhibited his shield and asked "Can I come in and speak to you?" (M76). As he spoke, he gestured toward the inside of the apartment (M76). Libardo Gill then stepped back and the officers entered, stepping from the entrance directly into the living room.* There they observed Carmen Gill sitting at a table and on the table they observed what Powers believed to be two partially smoked marijuana cigarettes and some money (M77-8, 232). Powers based this opinion on numerous marijuana arrests he had made previously and upon courses he had taken in the police academy (M83-7).

Upon observing these cigarettes, Powers asked Carmen Gill whose cigarettes they were. Both defendants gestured with their hands; Powers construed this gesture to be a denial of possession of the cigarettes (M78-9, 91). He then told both defendants that they were under arrest (M91). Neither Powers nor McQueen said anything further to defendants at that time (M91). Powers then told McQueen that he was

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* A diagram of the apartment is annexed to the opinion of Judge Cannella on the motion to suppress evidence, which opinion is set forth in the joint appendix to appellants' brief.

going to search through the apartment in order to "make sure nobody else" was there (M91).

Powers proceeded to walk through the apartment (M98). He walked from the living room into a hallway and then from there, he entered the kitchen of the apartment (M98; see diagram annexed to opinion below). There he observed two bags, one of which had marijuana bricks protruding from it (M98). He then called McQueen into the kitchen to show him what was there (M99). Powers also observed a third bag in the kitchen containing a white powder which he believed to be narcotics (M99-100). Powers proceeded to search through the remaining rooms of the apartment, finding no one else there (M99). After the officers made these observations, McQueen directed Powers to watch the two defendants and McQueen stated that he was going to make a telephone call (M101).

As McQueen then went to the rear of the apartment to make the call, Powers remained with the defendants in the living room (M101). At this time, Carmen Gill pointed to some money on the table in the living room. motioned toward it and then motioned "towards her body as if placing it into a pocket" (M101-2). Powers asked her "what for" and Carmen Gill pointed to herself, her husband, Powers and the window, slapping her palms together and rubbing them together (M102).

Powers said "not enough, too small" (M103). At this point McQueen had entered the room and Carmen Gill stated to him that she had more money (M104). Powers asked where it was and she walked toward a closet in the hallway which extended from the living room (M105).

From the closet Carmen Gill reached up to a shoe box. Powers told her not to touch it whereupon he took it from the closet (M105). She then offered the officers $2,000 each, which figure was spoken in English (M107). McQueen then went to make another telephone call during which time Powers spoke to the defendants (M109). During this conversation Carmen Gill gave Powers another $1,000 (M110). Later, after two more officers arrived, including a Detective Pagan, additional money was offered to the officers as a bribe; the total amount offered, including the initial amount offered to Powers and McQueen was $21,000 (M111, 114).

Later that afternoon, at approximately 4 p.m., Powers left the apartment and returned at approximately 7 p.m. with a search warrant for the apartment (M111). Detective Pagan then explained to defendants that the police had a search warrant and were going to search the apartment (M112). The officers then proceeded to search the apartment for the second time and they now seized the

following items: the three bags that had previously been viewed in the kitchen, which bags contained nineteen pounds of marijuana and approximately one pound of cocaine; scales; plastic bags; tin foil; and miscellaneous papers from underneath the sink cabinet in the kitchen; safe deposit box keys and a calculator under a bed mattress; the two marijuana cigarettes that had been observed on the table in the living room and another partially smoked marijuana cigarette from the refrigerator top; passports; some film; $72,000 in cash including the $21,000 that had been offered as a bribe;* approximately $72,500 in money order receipts (M63-4, 113-6; see the inventory return on the warrant, set forth in the joint appendix to appellants' brief).

On cross-examination, Powers testified that Libardo Gill had indicated that he understood some English but very poorly (M121). The only specific question which Powers was able to recall Libardo Gill being able to answer was a question as to his name (M122). Powers' command of the Spanish language was very poor (M123). Carmen Gill also spoke English very poorly (M124). The officers had difficulty communicating with the defendants (M139). Indeed,

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* This sum of $72,000 included the money that Powers said had been found in a second shoe box (M114-5, 190).

Powers acknowledged testifying at another hearing concerning the same events here in question that neither defendant understood one word of English (M156-9).

The first time defendants were advised of their Miranda rights that day was at about 6:00 or 7:00 p.m. after the search warrant had arrived at which time one of the officers said that the defendants "are talking too much, you better give them a warning" (M130, 146, 199).

Asked why, upon the arrest of defendants for possession of the two marijuana cigarettes, he did not then take defendants to the stationhouse and attempt to obtain a search warrant rather than proceeding to search the apartment right after the arrest, Powers replied that it was "departmental procedure to make sure there are no other perpetrators in that apartment" (M131).

B. The Trial: Summary of the Government's Proof

Introduction

The evidence introduced by the government on its entire case is summarized in the joint statement of facts set forth in the joint brief of all appellants. Appellants Libardo and Carmen Gill respectfully refer the Court to

that statement of facts and incorporate it herein as their statement of the government proof on the entire case.

The trial evidence summarized hereunder is the government proof specifically relating to Libardo and Carmen Gill. That proof may be divided into five categories: (1) testimony of undercover police officer John De Rosa relating to his efforts to purchase narcotics in 1972; (2) surveillance by law enforcement agents in 1974; (3) telephone conversations intercepted pursuant to court authorized electronic surveillance in 1974; (4) documents seized from other co-conspirators which were alleged by the government to relate specifically to the Gills; (5) the arrest of the Gills on September 30, 1974 and seizures made pursuant to that arrest.

1. Testimony of Detective John DeRosa

John De Rosa, a New York City police detective, testified that on September 20, 1972, while acting in an undercover capacity, he knocked on the window of an apartment at 56 W.85th Street, and was greeted by Eddie Vasquez*(T1942-3).

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* Vasquez was named as a co-conspirator in the government's amended bill of particulars (T1955).

De Rosa mentioned a friend named Monte and stated that he was looking for "Carmen" (T1943). De Rosa then saw Vasquez speak to defendant Carmen Gill and return a few minutes later (T1943). Vasquez asked what De Rosa wanted to which De Rosa replied that he wanted to purchase some cocaine (T1943). Vasquez said that "she was all out of stuff right now and all she had was grass or marijuana"(T1943). After talking further with Carmen Gill in Spanish, Vasquez said that De Rosa could not get any cocaine because Monte owed Carmen some money (T1944).

On September 27, 1972, De Rosa returned to the same location (T1946). He attempted to speak to her "but all I could understand was that she didn't speak English" (T1946; emphasis added). She then motioned to someone named Carlos to come over to them and Carlos, after conversation with her, motioned for De Rosa to follow him to another location where Vasquez was located (T1946). De Rosa told Vasquez that he wanted to purchase some cocaine at which time Vasquez spoke to Carlos in Spanish and Carlos walked away (T1947). Vasquez told De Rosa that Carlos was going to get an eighth of cocaine and that it would cost $2,500 (T1948). A few minutes later Carlos and Carmen Gill drove up to De Rosa and Vasquez in a car (T1948). Vasquez spoke in Spanish to Carmen and then told De Rosa that Carmen had nothing; he further stated

Carmen had said there was "a lot of heat" in the area (T1949).

De Rosa further testified that at no time did he have any conversation directly with Carmen Gill (T2047).

2. Surveillance in 1974

Several police witnesses testified that their surveillance in 1974 resulted in the following observations with respect to the Gills:

(1) On May 8, 1974, defendants Armedo-Sarmiento, also known as "Mono", and Carlos Marin, also known as Carlos Guarin, entered 580 Amsterdam Avenue, the building where the Gills resided (T3776).

(2) On May 9, 1974, Mono, Carlos Guarin and a woman named Lola exited 580 Amsterdam Avenue and entered a car which was registered to defendant Marconi Roldan. Carmen Gill and two unidentified males then approached the car and engaged them in conversation. Carmen and Lola then entered 580 Amsterdam Avenue; Lola then exited the building and drove away with Mono and Carlos Guarin (T4238-40).

(3) On May 22, 1974, Libardo Gill entered apartment 10F, 215 East 64th Street, where Mono resided. Fifteen minutes later, Mono and Libardo Gil exited together and drove

to the west side of Manhattan where Mono got off at 77th Street and Central Park West and Libardo continued to 580 Amsterdam Avenue (T4426-7).

(4) On May 27, 1974, Mono entered 580 Amsterdam Avenue (T4433-4).

(5) On June 10, 1974, the following persons were observed in apartment 10F, 215 East 64th Street: defendants Libardo Gill, Arturo Gonzalez, Gilberto Rojas, Guillermo Pallacios, Ernesto Guello and someone named Omar (T5089-90).

(6) On June 30, 1974, Libardo Gill was in the La Floresa Restaurant in Queens with Mono, Luis Estrado and another person. The four left the restaurant and drove to 4872 37th Street in Queens where they remained for a while. They then drove to Flushing Meadows Park where they remained about an hour or two and then drove to Manhattan (T4957-60).

(7) On July 10, 1974, Libardo Gill drove to 4872 37th Street in Queens, entered the building and returned to his car in a short time with a bag which appeared to have a celery stalk hanging out the top (T4966-7). He then re-entered the building and again returned with a bag (T4967). He opened the trunk of his car, placed the bag inside the trunk, put his hands in the bag and removed another bag (T4968). Tape on the latter bag snapped open and some white powder fell out on his hand (T4968).

3. Intercepted Telephone Conversations of Carmen and Libardo Gill

Of 7,000 telephone conversations intercepted pursuant to court-authorized electronic surveillance in 1974, the government introduced at trial four which it contended were conversations in which either Carmen or Libardo Gill participated.*

The first recorded conversation occurred on May 7, 1974 (GX 200A, number 150; T4369).** This is a recording of a conversation from Mono's telephone to a telephone number subscribed to by an Alberto Gill at 580 Amsterdam Avenue, apartment 3D (T4104-14). The government's transcript of this conversation identified the speakers as Mono and Carmen Gill. In this conversation, Mono says that he had "a very bad injection" and that he "got rid of everything". Mono asks if she has seen Carlos; Carmen Gill states that she has not and that Carlos was going to come to see "whether we were going to make that car deal or not".

The second recorded conversation occurred on May 7, 1974 (GX 200A, number 166; T4604). This is a recording of an incoming call to Mono's apartment from Libardo Gill.

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* These conversations were in Spanish. The government prepared English translations of these conversations which the jury was permitted to use in listening to the conversations.

** Citations preceded by "GX" are to government exhibits at trial.

In this conversation Mono states that he went out to get some money orders and apparently makes reference to some money being stolen from his apartment. Libardo Gill asks Mono if "that little thing is already over there" and Mono says that it is. Libardo Gill states that he is expecting a call at eleven o'clock which is a signal for him to call someone else. Libardo Gill then states that he will do an errand for Mono if Mono can not go out.

The third recorded conversation occurred on May 16, 1974 (GX 200A number 427, T4778). This is a recording of a call from Mono to Libardo Gill. In this conversation Libardo states that he "did a small transaction". Mono refers to someone having a customer. Mono also talks about someone owing something to "Bernardo" and "Alberto".

The fourth recorded conversation occurred on May 27, 1974 (GX 200A, number 766, T4920). This is a recording of a call from Mono to Libardo Gill. Mono tells Libardo that someone named "El Poli" has arrived and must talk with Libardo urgently. Libardo tells Mono that when he sees "El Poli", he can give him "the thing".

4. Other Documents Seized which Relate to Carmen or Libardo Gill

On August 23, 1974, DEA agents arrested co-conspirator

Alvero Hernandez who at that time had on his possession a slip of paper with a telephone number next to the word "Carmenza"; that telephone number was subscribed to by Alberto Gill at 580 Amsterdam Avenue (T5227, 5250).

On September 3, 1974, law enforcement agents assigned to this case seized from apartment 6A, 327 West 30th Street, several items including a writing that appears to say "I owe Libardo".* (T5734-5, 6904; GX 319A). This was an apartment to which the police had previously observed co-defendants Mono and Ruben Dario Roldan bringing a box (T5004-5).

5. Events of September 30, 1974 at the Gills' apartment: Their arrest, seizures made there and statements made by them.

At trial, police officers testified as to the arrest of the Gills at their apartment on September 30, 1974, all of the material seized there by the police and the bribe offer made by the Gills that day. Those events have been summarized in the Statement of Facts, Section A, supra.

Additionally, the officers testified as to other

* There was some dispute at trial about the legibility of this document.

statements made by the Gills to the police after their bribe offer and prior to the search of the apartment, all of which statements were made prior to any Miranda warnings being given to the Gills.

The defendants told the police that the money they had offered did not belong to them; that the drugs in the apartment belonged to someone named Jesus; that Jesus came every week to collect money and packages from them and to leave other packages there; that they did this for a percentage; that in regard to the $20,000 discussed with the officers, they would explain to Jesus its disappearance by claiming that they had been ripped off; that one of them was from Medellin, Columbia and the other from Bogota; that they had been here for three years illegally; and that they shared this apartment with another woman (T5621-31).

Also introduced at trial as evidence against the Gills were an additional $62,500 in cash and money orders which were seized by the police in a safe deposit box which matched the safe deposit key seized from the Gills at the time of their arrest in the apartment (5659-76, T5990-3). Analysis of these money order receipts seized from the Gill apartment revealed that they were deposited into the account of one Carlos Barvo, the same account to which money orders seized

from co-defendant Jose Antonio Cabrera-Sarmiento ("Pepe") were deposited (T6911, T6926-7).

DEA agent Robert Nieves testified as an expert witness as to the meaning of the writings on the papers seized from the Gills' apartment during the search on September 30, 1974.* He testified that in his opinion they represented a detailed statement of marijuana and cocaine transactions including transactions with co-defendant Mono. The cocaine transactions reflected therein are in kilo amounts with the price of one kilo being $26,500, and the marijuana transactions are in pound amounts with the price of one pound being $675 (T6926-45, 7891-2). These documents also contain the following reference: "Alberto B paid $131,200" (T6903, 7892). One of the papers seized from the Gill apartment contained a notation to the effect that "Alberto B received $131,200", "L took 25", and "Car took 25" (T6903).

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* Charts prepared by the government from these documents were exhibited to the jury by the government in connection with agent Nieves' testimony (T6936).

POINT I

THE TRIAL COURT ERRONEOUSLY DENIED THE MOTIONS BY DEFENDANTS CARMEN AND LIBARDO GILL TO SUPPRESS ALL EVIDENCE OBTAINED BY THE SEARCH OF THEIR APARTMENT.

Introduction

Prior to trial defendants Carmen and Libardo Gill moved to controvert a search warrant issued for their apartment, 580 Amsterdam Avenue, apartment 3D, and to suppress all evidence obtained by search of that apartment.* After a two-day hearing on these motions Judge Cannella, in his opinion denying the motions, found the following facts to have occurred:

On September 30, 1974, two New York City police officers, Powers and McQueen, came to the Gills apartment at 580 Amsterdam Avenue, apartment 3D, to question them concerning a homicide that they were investigating. Invited by one of the defendants into the living room, the front room of the apartment, they observed two marijuana cigarette butts on a table in that room. They placed defendants under arrest

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* Set forth in the joint appendix to appellants' brief are the search warrant, the affidavit in support thereof, the inventory returned on the search warrant, the motions by the Gills to controvert the warrant and to suppress evidence, and the opinion by Judge Cannella on the motions to suppress evidence. (Appendix, pp. 329a-364a).

for possession of the cigarettes. Powers then commenced a search of the apartment, leaving the living room, walking through a hallway and into the kitchen. There Powers observed two shopping bags out of which were protruding what he believed were several bricks of marijuana; he also observed a third open bag containing a white powder which he believed to be heroin or cocaine. Powers called McQueen into the kitchen to show him what he had found.

Immediately following this search, the Gills made a bribe offer to the policemen in order to enable them to avoid arrest. After several other officers had arrived at the apartment, Powers left the apartment and presented a New York State Supreme Court Justice with an affidavit in support of an application for a search warrant pertaining to the premises.

The affidavit misstated the sequence of events in the apartment. It stated that the order of events was as follows: (1) arrest of defendants for possession of the two marijuana cigarettes; (2) bribe offer to the arresting officers; (3) search of the kitchen which revealed the three bags containing marijuana bricks and cocaine or heroin. On the basis of this affidavit, a warrant to search the apartment was issued. Powers then returned to the apartment with the warrant and the officers proceeded to seize numerous items

including the three bags which they had previously observed in the kitchen.

At trial the government introduced all of the physical evidence seized from the Gills' apartment. Additionally, the government, over objection (T5464-5), introduced the officers' testimony as to the bribe attempt made by the Gills. The bribe testimony was offered as proof of the Gills' consciousness of guilt of the narcotics offense charged in the indictment and was admitted by the court only against those two defendants (T5465, 5483).

Summary of Appellants' Arguments

On several significant grounds, each independent of the other, the court below erred in denying the Gills' motion to suppress this evidence - the tangible objects seized as well as the oral admission of guilt in the form of the bribe offer. Point I, infra, will discuss the various Fourth Amendment violations involved in the search and seizure of the Gills' apartment, each of which requires suppression of the evidence obtained, as follows. Section A, infra, will discuss the unlawfulness of the first search of the kitchen during which the three bags were observed.

In Section B, infra, appellants submit that this initial unlawful search of the kitchen fatally tainted the entire process of obtaining a search warrant and all seizures

made pursuant thereto.

In Section C, subsection 1, infra, appellants submit that, assuming arguendo that the initial unlawful search did not invalidate the search warrant itself, nevertheless, the bribe offer should have been excluded from use in the affidavit in support of the search warrant and from use at trial because it was the product of the unlawful search of the kitchen. The consequence of exclusion of the bribe offer from the affidavit is that the affidavit fails to set forth probable cause for issuance of the warrant. Section C, subsection 2, infra, will analyze the anticipated argument by the government against exclusion of the bribe offer.

In Section D, infra, appellants submit that assuming arguendo that appellants' contentions in Sections B or C are not sustained by this Court, nevertheless the warrant must be voided because the affidavit in support of it fails to set forth probable cause for issuance of the warrant.

Independent of these substantial reasons, each compelling suppression of the evidence in question, still further significant Fourth Amendment violations require suppression of this evidence. In Section E, infra, appellants submit that perjury in the affidavit invalidates the warrant.

Additionally, beyond each of these grounds for

invalidating the warrant, appellants submit, in Section F, infra, that the seizures were unlawful because of the overly broad scope of the search. Here, appellants argue that the warrant unlawfully authorized a general search of the apartment, and further, assuming arguendo that the warrant was sufficiently particularized, the officers exceeded its authority by executing it as a general search warrant.

In sum, each of these violations of the Gills' Fourth Amendment rights mandated suppression of all evidence obtained by the search of their apartment.

Finally, in Section G, infra, appellants will discuss the effect of admission at trial of this unconstitutionally obtained evidence. So devestating was the impact of this evidence that the harmless error rule is manifestly inapplicable here and reversal of Carmen and Libardo Gills' convictions is required.

A. The first search: search of the kitchen

Judge Cannella correctly found that the warrantless search of the kitchen immediately following defendants' arrest for possession of two marijuana cigarettes was unlawful. "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate are per se unreasonable under the Fourth Amendment - subject only to a few specifically

established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967). The search of the kitchen did not fall within any of these "well-delineated exceptions."

To begin with, this search was clearly not incident to defendants arrest. Chimel v. California, 395 U.S. 752 (1969). The arrest occurred in the living room - the front room of the apartment. The search occurred in another room in an interior section of the apartment.

Nor, as Judge Cannella correctly observed, were exigent circumstances present to justify the intrusion into the kitchen. Exigent circumstances which permit a warrantless search have been defined as follows: (1) hot pursuit of a dangerous felon: (2) the ongoing or threatened destruction of or the threatened removal of goods ultimately seized. Vale v. Louisiana, 399 U.S. 30 (1970); Carroll v. United States, 267 U.S. 132 (1925); United States v. Pino, 431 F.2d 1043 (2nd Cir 1970). The arrest here was merely for possession of marijuana cigarettes, a New York State misdemeanor. The officers, as Judge Cannella found, had no basis for believing that other persons were in the apartment, that they were in danger or that defendants were dangerous. Clearly, there were no exigent circumstances which justified the warrantless search of the kitchen.

And, inapplicable here is the so-called "plain view"

exception to the warrant requirement. See Coolidge v. New Hampshire, 403 U.S. 443 (1971). That exception avails only where a policeman has a "prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." Id. at 466. Here, of course, there was no "prior justification" for Powers to be in the kitchen.

Thus, as Judge Cannella properly ruled, the warrantless search of the kitchen, falling within none of the "specifically established" exceptions to the warrant requirement, Katz v. United States, supra at 357 violated defendants' Fourth Amendment rights.

B. The search warrant: "fruit of the poisonous tree"

Recognizing the unlawfulness of the initial search of the kitchen, nevertheless, the court below, in its opinion on the motion to suppress evidence, went on to hold that the officer's obtaining a search warrant for seizure of the three bags in the kitchen, as well as other items in the house, rendered those seizures lawful. In its analysis, the court below totally failed to come to grips with the effect of the initial unlawful search upon the entire process of obtaining a search warrant and committed fundamental error in construing the scope of Fourth Amendment protection.

In his opinion Judge Cannella ruled that the bribe attempt made by the Gills after the unlawful search was not tainted by the unlawful search, that the bribe attempt could therefore lawfully be used in the application for the search warrant, and that application, including the information about the bribe attempt, furnished probable cause to issue the warrant. The seizures in the apartment were made pursuant to the warrant and, concluded Judge Cannella, were therefore lawful.

In this artificially circumscribed manner, Judge Cannella segregated the initially unlawful search and failed to analyze whether the very act of applying for a search warrant was the result of the officers' observations of a substantial quantity of drugs during their initial, unlawful search of the kitchen. In short, the court below did not address itself to the fundamental issue of whether the action taken by the officers in applying for and obtaining a search warrant was "fruit of the poisonous tree". Wong Sun v. United States, 371 U.S. 471, 487 (1963).

The major formulation of the test for determining whether evidence is "fruit of the poisonous tree", was set forth in Wong Sun v. United States, supra, 371 U.S. at 487-8:

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal

> actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)."

Where evidence is obtained after an illegal search, the government has the clear burden of proving that the disputed evidence is not tainted by an unlawful search. Brown v. Illinois, 422 U.S. 590 (1975); see United States v. Falley, 489 F.2d 33 (2nd Cir. 1973). The government failed to meet its burden of proving that the warrant "process" was not "initiated by the unlawful act" involved in the initial search of the kitchen. United States v. Paroution, 299 F.2d 486 (2nd Cir. 1966). Unquestionably, the officers' actions here in applying for and obtaining a search warrant for the seizures made in the Gills' apartment was "come at by exploitation", Wong Sun v. United States, supra, 371 U.S. at 487, of the illegality of the initial search of the Gills' apartment.

It was only by means of this unlawful search that the officers discovered the substantial quantity of drugs in the kitchen - marijuana bricks and cocaine or heroin in the three bags. At the time of their application for the search warrant, the only drugs - other than the two marijuana cigarette butts - observed by the officers were the drugs in the kitchen. The only items particularly described for seizure in the warrant were the drugs unlawfully observed in the kitchen. It defies common sense to assume that the police officers, based on an observation of the remnants of two marijuana cigarettes and the offer of a bribe to

them, would have gone to the effort of obtaining a search warrant if they had not first made the unlawful observations in the kitchen. Clearly, the major reason for the officers' application for the warrant was their initial unlawful discovery. In the most basic sense, then, the warrant process here was "come at by exploitation" of the initial unlawful search.

Thus, appellants respectfully submit that the government failed to meet its burden of proving that the police action in seeking and obtaining a search warrant here was not tainted by the initially lawless search of the Gills' apartment.

C. The bribe offer

1. "fruit of the poisonous tree"

Assuming arguendo that this Court does not view the obtaining of the search warrant as fruit of the unlawful search of the kitchen, appellants respectfully submit that, notwithstanding this, the bribe offer made by the Gills after this unlawful search was fruit of the poisonous tree. Accordingly, the court below erred in ruling that the bribe offer could be used in support of the application for the warrant and further that the bribe offer was admissible against the Gills on the narcotics offense for which they were tried.

The prohibition of the exclusionary rule, of course, "extends as well to the indirect as the direct products" of invasion of Fourth Amendment rights. Wong Sun v. United

States, supra, 371 U.S. at 484. "[V]erbal evidence which derives so immediately" from violation of Fourth Amendment rights "is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion." Id. at 485. And, the exclusionary rule bars use of unlawfully obtained evidence not only at trial but as the basis for issuance of a warrant for further search. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Walder v. United States, 347 U.S. 62 (1954); Alderman v. United States, 394 U.S. 165 (1969); United States v. Gray, 484 F.2d 352 (6th Cir. 1973).

In determining whether the bribe evidence was tainted by the unlawful search, Judge Cannella misconstrued the governing criteria. He perceived the test to be whether the bribe offer was made "freely and voluntarily" by the Gills (Opinion of Judge Cannella, p. 15). However in Brown v. Illinois, 422 U.S. 590 (1975), the Supreme Court stated that voluntariness is a test for admissibility under the Fifth Amendment, not the Fourth. "[E]ven if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains." Id. at 601-2; see United States ex rel. Chennault v. Smith, 366 F.S. 717 (E.D.N.Y.) aff'd 495 F.2d 1367 (2nd Cir. 1974); Moffett v. Wainwright, 512 F.2d 496 (5th Cir. 1975).

Ruling on the admissibility of statements made by a defendant after an unlawful arrest, the Supreme Court, in Wong Sun v. United States, supra, stated that in order to establish that the statements were not the result of invasion of Fourth Amendment rights, the government must prove that they resulted from "an intervening independent act of a free will". 371 U.S. at 486. If not "sufficiently an act of free will to purge the primary taint of the unlawful invasion", ibid., the statements must be suppressed.

Applying Wong Sun to the admissibility of statements made after an illegal arrest or search, courts, including those of this circuit, have held that if the statements were "induced or triggered" [United States ex rel. Chennault v. Smith, 366 F.S. 717 (E.D.N.Y.), 495 F.2d 1367 (2nd Cir. 1974); Barnett v. United States, 384 F.2d 848, 862 (5th Cir. 1967)] or "prompted" [United States v. Basurto, 497 F.2d 781, 790 (9th Cir. 1974)], they were not "sufficiently an act of free will to purge the primary taint of the unlawful inversion", Wong Sun v. United States, supra 371 U.S. at 484, and therefore, must be suppressed.

Clearly, the bribe offer in the instant case was "induced" and "triggered", United States ex rel. Chennault v. Smith, supra, by the unlawful search of the kitchen. No bribe attempt was made at the time of the Gills' arrest in the

living room for the relatively minor offense of possession of two marijuana cigarettes. It was only after Powers had commenced his unlawful search of the apartment, observed the marijuana bricks and white powder in the kitchen, and further exploited this by calling his brother officer, McQueen, into the kitchen to observe this evidence that the Gills made a bribe offer.

Moreover, in any assessment of whether oral statements are "fruit of the poisonous tree", it is significant to realize that an illegal search and seizure, as in the instant case, constitutes considerably greater compulsion to talk than does an illegal arrest. When a citizen is arrested, he generally knows that the arrest itself does not increase the chances of his conviction or add in any way to the evidence that law enforcement agents possess against him. In sharp contrast, "[w]here there is an actual illegal seizure, the realization that the 'cat is out of the bag' plays a significant role in encouraging the suspect to speak." Pitler, The Fruit of the Poisonous Tree Revisited and Shepardized, 56 Cal. L. Rev. 579, 607 (1968).

Accordingly, the bribe offer made by the Gills was the product of the unlawful search of their apartment and the bribe offer - the verbal statements as well as the money involved in the attempt - was therefore barred from use

in the officers' application for a warrant to search the apartment and from use at trial.

2. Analysis of the government's argument for admissibility

In support of admissibility of the bribe offer, the government will doubtless adopt the reasoning of the court below and argue that the bribe offer made by the Gills to the police was a contemporaneous, independent crime and therefore not subject to the prohibition of the exclusionary rule. Although this Court has not yet ruled on the issue of the applicability of the exclusionary rule to the commission of a crime during the course of an illegal arrest or search, several courts have considered the question.

Among the courts that have ruled on whether the independent offense committed in the course of an unlawful arrest or search may be prosecuted, there is a division. Several federal courts, including a district court in this circuit, have held that the exclusionary rule does not bar prosecution for the independent offense. United States v. Perdiz, 256 F.S. 805 (S.D.N.Y. 1966); Vinyard v. United States, 335 F.2d 176 (8th Cir. 1964); United States v. Troop, 235 F.2d 123 (7th Cir. 1956). At least one major court has ruled to the contrary. In People v. Cantor, 36 N.Y.2d 106 (1975), the New York Court of Appeals held that a defendant who responded

to an unlawful seizure of his person by pulling a gun on the police officers could not be prosecuted for the crimes involved in that act - possession of a weapon and reckless endangerment - because those acts were "fruit of the poisonous tree".

However, unlike the present case, the precise issue in those cases was whether the exclusionary rule barred prosecution for the offense committed during the illegal search. Basic to the discussion in the present case is recognition that the issue here is quite different. Here, the bribery attempt was used by the government - both in the application for the search warrant and at trial (T5483) - as an admission of guilt of another crime, the narcotics violation for which they were tried. Thus, the issue here is not whether the Gills may be prosecuted for this bribery. The issue is whether the bribe attempt may be used in this manner - as an admission of guilt of the crime which was the subject of the unlawful search.

Research, however, has disclosed no case on the issue posed here - admissibility of a new and independent offense committed during an unlawful search as an admission of guilt in a prosecution for a past offense which was the subject of the unlawful search. This Court's decision in United States v. Gentile, 521 F.2d 252 (1974), cited by Judge Cannella, was not concerned with the Fourth Amendment exclusionary rule. The issue in Gentile was whether a taxpayer who had not been given the Miranda warnings could be prosecuted for an attempt

to bribe an IRS agent who was questioning him. The Court held that failure to give the Miranda warnings did not bar prosecution for the bribe attempt. Thus, Gentile did not involve application of the Fourth Amendment exclusionary rule.

In any event, irrespective of how this Court would resolve the controversy over whether the Fourth Amendment exclusionary rule bars prosecution of an independent offense such as bribery committed during an unlawful search, analysis of the facts here reveals that to sanction use of the bribe offer in the manner permitted by the court below would be a perversion of the exclusionary rule.

Quite simply what has happened here is the following. The police made an unlawful search of the Gills' apartment during which they discovered drugs. Seizure of those drugs would, as Judge Cannella recognized, be unlawful at that point. After the unlawful search, the Gills made a bribe offer. The officers immediately proceeded to obtain a search warrant to seize the drugs they unlawfully observed. Judge Cannella in effect viewed the bribe offer as an admission of guilt of possession of narcotics and proceeded to uphold the warrant primarily on the officer's allegation in the affidavit about the bribe. Thus, the holding of Judge Cannella is that where there is an unlawful search, an incriminating admission as to an object found during the unlawful search may then be used to justify seizure of that object.

If this holding is sustained, it would remove any incentive for police officers to obey the Fourth Amendment. It would mean that police could search a person without any justification on the hope that the search revealed contraband and that if the subject, in response to the unlawful search, made an incriminating statement in regard to it, the police could lawfully proceed to seize the item. Surely, this holding by Judge Cannella is antithetical to the purposes of the exclusionary rule. Whether the incriminating statement where, as here, is the nature of a bribery offer, may be independently prosecuted, is another issue and one not presented for review here.

In sum, on analysis, the argument made by Judge Cannella - and the argument it is anticipated that the government will make - for permitting use of the bribery offer in the warrant application contravenes the purpose of the exclusionary rule. Effective preservation of Fourth Amendment rights requires that the Gills' admission in the form of the bribe offer be barred from use in the application for the search warrant.

D. No probable cause for issuance of a warrant to search the apartment

Assuming arguendo that the exclusionary rule does

not prohibit prosecution use of the bribe offer made in response to the illegal search of the Gills' kitchen, and that the fact of the bribe offer may therefore be used in assessing whether the affidavit furnished probable cause for a search warrant, nevertheless, the facts set forth in the affidavit, even including the bribe offer, failed to establish probable cause for the issuance of the warrant. The court below therefore erred in denying the Gills' motion to controvert the warrant and suppress all evidence seized pursuant to it.

The affidavit in support of the warrant to search the Gills' apartment set forth three events, all occurring in the Gills' apartment earlier on the day of the application for the warrant: (1) the Gills were arrested in the front room [living room] of their apartment for possession of two marijuana cigarettes in plain view of the officers upon their entry into that room; (2) after this arrest, Carmen Gill offered the arresting officers "a sum of money as a bribe not to make the arrest" (Powers' affidavit, p. 1); (3) during the bribe offer, one of the officers searched the apartment and in the kitchen observed three bags containing what the officer believed to be marijuana bricks and heroin or cocaine.

As stated in Section A, supra, Judge Cannella, in his opinion on the Gills' motion to suppress evidence, correctly found that event (3) - the search of the kitchen which revealed

the three bags containing drugs - was unlawful. Accordingly, Judge Cannella, in determining whether the affidavit furnished probable cause for issuance of a warrant to search the apartment, properly excised the observations made during the unlawful search of the kitchen. However, in concluding that the remaining two events - (1) and (2), supra - "provided Justice Roberts* with a substantial basis for a conclusion that other contraband was probably present in the apartment" and thus constituted probable cause for issuance of the warrant (Opinion of Judge Cannella, p. 13), the court below clearly erred.

The oft-repeated test for determining the quantum of evidence that constitutes probable cause is whether the evidence would "warrant a man of reasonable caution in the belief" that the material sought is on the premises to be searched. Carroll v. United States, 267 U.S. 132, 162 (1925); Brinegar v. United States, 338 U.S. 161 (1949); Wong Sun v. United States, supra, 371 U.S. at 479; Berger v. United States, 388 U.S. 41, 55 (1967).

In applying this test in the instant case, it is significant to note a major distinction between this case

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* New York State Supreme Court Justice, Hon. Burton B. Roberts.

and the normal case in which an appellate court reviews a magistrate's determination that an application for a search warrant sufficiently set forth probable cause. In the latter case, the general rule, of course, is that the appellate court should give substantial deference to the issuing judge's determination of probable cause. See United States v. Ventresca, 380 U.S. 102 (1965). In this case, however, because of the unlawful search which gave rise to the facts set forth in the affidavit, see Point I, A, supra, and the misstatements in the affidavit, see Point I, E, infra, that deference should not be given to the affidavit. To the contrary, the agents' blatant unlawfulness and misstatements should require even greater than usual scrutiny of the affidavit by the appellate court in making its own independent evaluation of probable cause.

So scrutinized, the meagre allegations in the instant affidavit - that one of the defendants here offered money as a bribe not to make an arrest for possession of marijuana cigarettes - utterly fail to "warrant a man of reasonable caution in the belief" that drugs - other than the two cigarettes - were present in the defendants' apartment. The reasonable and natural inference of these simple facts is that the bribe was offered precisely for the purpose stated in the affidavit - to avoid arrest for the cigarettes, not to prevent detection of or apprehension for more serious

possessory crimes being committed in the apartment. There is no more reason to believe from these facts that a large quantity of drugs were present in the apartment than there would be reason to believe that a driver who is arrested for speeding and offers a bribe to the officer has drugs in the trunk of his car.

Further, the affidavit does not even specify the sum of money. If, in fact, the affidavit stated that a large sum had been offered, a stronger, though still insufficient argument could be made by the government on probable cause. But this bare allegation of "a sum of money" being offered leaves the inference of a small sum - for example, five dollars - as well as a large sum. Of course, a policeman's affidavit in support of a search warrant must not be interpreted in a "hyper-technical" manner. United States v. Ventresca, 380 U.S. 102, 109 (1965). But the Constitution still requires probable cause as basis for a warrant to invade the privacy of a man's premises. The affidavit here simply did not do that. Indeed, the facts in the affidavit here do not even furnish basis to suspect, let alone probable cause to believe, that drugs would be found in the apartment.

Accordingly, the court below erroneously denied the motion to controvert the warrant.

E. Perjury in the affidavit in support of the search warrant

Apart from all of the foregoing reasons for invalidating the warrant, additionally, it must be voided because of the serious misstatements contained in the affidavit. These misstatements in the affidavit, as previously noted, were that the bribe offer preceded the search of the kitchen which revealed the marijuana bricks and cocaine or heroin powder there. Directly contrary to these allegations, the actual sequence of events, as conceded by the officers at the hearing and as found by Judge Cannella, was that this search of the kitchen preceded the bribe.

The rule in this Circuit is that a misstatement in an affidavit in support of a search warrant voids the warrant in either of two cases: (1) where the misstatement is non-material but is intentionally false; (2) where the misstatement is material even though made negligently. United States v. Pond, 523 F.2d 210 (2d Cir. 1975); United States v. Gonzalez, 488 F.2d 833 (2nd Cir. 1973); see also United States v. Carmichael, 489 F.2d 983, 989 (7th Cir. 1973)(en banc).

In the present case, the warrant must fall on both of these grounds.

First, the misrepresentation as to the sequence of events can only be viewed as intentionally made. Detective

Powers submitted the affidavit in question here in the short space of several hours after the events that he personally had observed. The affidavit in question is only one and one-half pages in length and in essence sets forth only three relevant facts: the marijuana arrest, the bribe offer and the search. Yet, astoundingly, in such a short time and in such a short affidavit, Powers misrepresented the sequence of these three critical events.

Unlike Pond where this Court found that the totality of the affidavit revealed the misstatement there in question to have been negligently made, here the few facts were of such stark simplicity and their actual chronology of such import to the magistrate's assessment of whether a warrant could issue that the conclusion of perjury by Powers in this affidavit is inescapable.

But even if this Court finds the misstatements to have been negligently made, the warrant must still be voided because of the materiality of these misstatements. In this regard, it is significant to note that it was a New York State court and not a federal court to which the affidavit was presented. Thus, the state court judge, Mr. Justice Burton B. Roberts, in determining whether the warrant should issue, was governed by New York law, so long as that law was consistent with federal constitutional standards. Ker v. California, 374 U.S. 23 (1963). And, as discussed earlier, New York law,

unlike the federal cases on this point, bars prosecution of an independent crime committed in direct response to an unlawful search. People v. Cantor, 36 N.Y.2d 106 (1975). Thus, under prevailing New York law, a state court judge, had he known the true facts - that the bribe was the fruit of the unlawful search - would not have given any weight to the bribe offer and would doubtless have refused to issue the warrant.

To the New York courts which in this area have recognized a broader Fourth Amendment protection than have the federal courts, the misstatements were therefore indisputably material. For this Court to ignore New York law here - where the arrest, search warrant and seizure all were actions of state authorities - would seriously breach federal-state relationships.

Thus, properly viewed, as it must be, in the light of applicable New York law, the affidavit in question here contained material misstatements. Under this Court's decisions, see United States v. Pond, supra, the consequence of these material misstatements is that the warrant must be voided.

F. Scope of the warrant: failure to particularize and execution as a general search warrant

Independent of all the foregoing reasons for voiding the warrant, analysis of the warrant itself reveals still

further substantial reasons for its invalidity. The warrant issued by Judge Roberts authorized the police to do the following:

> "You are therefore commanded, as soon as possible, to make a search of an apartment described as 3D in premises 580 Amsterdam Avenue, New York County, occupied by Libardo and Carmen Gill, as described in the affidavit, for 2 shopping bags of marijuana and [sic] 1 bag containing heroin or cocaine, the means of committing a crime or offense and the means of preventing a crime or offense from being discovered, and if you find any such property, or any part thereof to bring it before me at the Criminal Courts Building in New York County."

This warrant was unconstitutionally issued because it failed to limit the officers to seizure of particularized items and instead, authorized a general search of the apartment. Further, even assuming arguendo that somehow the warrant may be construed as limiting the seizure to particularized items, the officers acted in violation of the Gills' Fourth Amendment rights by executing it as a general search warrant, seizing a massive quantity of objects that were not specified in the warrant. These fatal defects in the warrant itself and in its execution mandate suppression of the items seized.

First, in regard to the warrant itself, it is perhaps not amiss in this Bicentennial year to recall the opprobrium with which general search warrants have been viewed in this country. Discussing the Fourth Amendment

requirement that a warrant "particularly describ[e] the ... things to be seized", the Supreme Court said:

> "These words are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure in their persons, houses, papers and effects' from the unbridled authority of a general warrant." Stanford v. Texas, 379 U.S. 476, 481 (1965).

And, as this Court has observed, the Fourth Amendment "makes it clear that nothing is to be left to the discretion of the officer executing the warrant". United States v. Dzialak, 441 F.2d 212, 216 (2nd Cir. 1971).

Contrary to the dictates of the Fourth Amendment, the instant warrant authorized a general search. Although in one part it particularized certain items to be seized - "2 shopping bags of marijuana & [sic] 1 bag containing heroin or cocaine" - the warrant went on in most general terms to authorize seizure of "the means of committing a crime or offense, and the means of preventing a crime or offense from being discovered." There is precious little that could be excluded from seizure under this grant of authority. For example, lamps, kitchen silverware and furniture all have the potential of being used to commit crimes of violence such as assault. And, likewise, virtually any object can be viewed as a "means of preventing a crime or offense from being discovered" - for example, as in this case, a bed between whose

bedboard, box spring and mattress, the officers seized incriminating evidence which was introduced at trial (M113-4, T5492-4, 5548-95, 5603-5).

Thus, the warrant here, violative of the clear command of the Fourth Amendment that "nothing ... be left to the discretion of the officer executing the warrant", United States v. Dzialak, supra, 441 F.2d at 216, in fact left everything to the discretion of the officers executing the warrant. The warrant was therefore invalid ab initio as a general search warrant and the court below erred in denying the motion to controvert it and suppress all objects seized pursuant to it.

Assuming arguendo, however, that this warrant can somehow be construed as limiting the officer's authority to seizure of the three particularly described items - the three bags - and thus not as a general warrant, still suppression is required because in their execution of the warrant the officers conducted a general search, grossly abusing the narrow authority to seize the particularly described items.

In Marron v. United States, 275 U.S. 192 (1925) the Supreme Court held that seizure of objects not specified in a search warrant violated the Fourth Amendment. The rule enunciated in Marron has, as this Court recognized in United States v. Pacelli, 470 F.2d 67 (1972), been modified to some extent by Coolidge v. New Hampshire, 403 U.S. 443 (1971). As

stated in Pacelli both the majority and dissenters in Coolidge:

> "found that where a police officer has a warrant to search a given area for specified objects, and in the course of the search comes across some other article of incriminating character, the property is seizable under the plain-view doctrine." United States v. Pacelli,

In the present case, the "plain view" exception to seizures of objects not specified in the warrant - that is, all objects save the three particularized bags - in inapplicable because those objects were not in plain view during an authorized search for specified objects.

The undisputed police testimony at the hearing on the motion to suppress revealed the following events. After exhibiting the warrant to the Gills, the officers first step was to take the three bags specified in the warrant from the kitchen where they were located and bring them to the living room which was the front room of the apartment (M112-3). Next, according to Detective Powers testimony, the officers:

> "searched every possible place for any contraband, anything that would be of any value," (M113; emphasis added).

The officers returned to the kitchen - after the seizure and removal of the three bags had been completed - and proceeded to search underneath a sink cabinet there where they found and seized miscellaneous papers and

paraphernalia used in the sale of narcotics (M114). In the bedroom, between the bedboard, the box spring and the mattress, they found safe deposit box keys. Additionally, they searched other areas of the apartment,including closets, and found approximately $72,500 in cancelled money order receipts and $50,000 in currency (M114).*

Manifestly, the police seized numerous incriminating materials which were not particularized in the warrant and which were not within "plain view" of the police during their authorized search and seizure of the three bags - the only items particularized in the warrant. Accordingly, all material other than the three bags which was seized during execution of the warrant was unlawfully obtained and should have been suppressed.

G. Admission of the unconstitutionally obtained evidence: not harmless error

In determining whether the use at trial of unconstitutionally obtained evidence at trial is harmless

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* This sum does not include the $21,000 allegedly offered as a bribe to theofficers [M114; see inventory of property taken under the warrant (Joint Appendix to appellants' brief)].

error:

> "[t]he question is whether there is a reasonable possibility that ... [it] might have contributed to the conviction." Fahy v. Connecticut, 375 U.S. 85, 86-7 (1963).

If so, then irrespective of whether there was independent evidence sufficient for conviction, reversal is required. See Chapman v. California, 386 U.S. 18 (1967).

The evidence against the Gills at trial, independent of that obtained through the search and seizure of their apartment on September 30, 1974, is summarized at pages 9 - 15, supra. Essentially, that evidence falls into four categories: (1) testimony of undercover police officer John De Rosa relating to 1972; (2) surveillance conducted by law enforcement agents in 1974; (3) telephone wiretaps in 1974; (4) papers seized from other co-conspirators.

First, as to De Rosa, his testimony concerned ambiguous and unsuccessful attempts to purchase cocaine from Carmen Gill in 1972 through an intermediary named Vasquez. De Rosa had no conversation with Carmen Gill herself because "she didn't speak English" (T1946). De Rosa's entire testimony as to statements made by Carmen Gill was a hearsay recitation of statements allegedly uttered by her to the intermediary Vasquez.

Second, as to the 1974 surveillance, the only observation of Carmen Gill was one occasion in which she was

seen speaking to the occupants of a car including co-defendant "Mono" (T4238-40). There were several observations of Libardo Gill in which he was seen with co-defendant "Mono", including one time when he was seen in Mono's apartment with Mono and several other co-defendants (T4426-7, 4957-60, 5089-90). On another occasion Libardo Gill was observed putting a bag into the trunk of his car, the bag came open and some white powder fell on his hand (T4966-8). None of this powder was seized by the police. There was no testimony as to what this white powder was.

Third, as to the wiretaps, of 7,000 conversations recorded pursuant to court authorization in 1974, several hundred of which were played at trial, the government introduced only four which allegedly were recordings of one of the Gills. They offered no voice identification testimony as to the Gills. One of the four conversations was allegedly between Carmen Gill and Mono and the other three were allegedly between Libardo Gill and Mono. There is no mention of narcotics in any of these brief conversations. The government's contention was that certain of the words used were code language for narcotics transactions.

Last, as to papers seized from co-conspirators which allegedly related to the Gills, one co-conspirator was arrested while in possession of a piece of paper containing the name

"Carmenza" alongside the telephone number of the telephone in the Gill apartment (T5227, 5250), and agents seized from the apartment of another co-conspirator a piece of paper which contained writing that appeared to say "I owe Libardo" (T5734-5, 6904, GX319A).

Thus, in a trial that lasted nearly three months and in a trial record of nearly 9,000 pages, this meagre evidence, summarized above, was the entirety of the government case against the Gills independent of that obtained by the search here in issue. Both Carmen and Libardo Gill respectfully submit to this Court that this evidence, independent of that obtained by the search, was legally insufficient to establish their guilt and further, that even if legally sufficient, this evidence presented at best a weak case against them.

Viewed in this context, as it must be to gauge whether the evidence obtained by the unlawful search of their apartment "might have contributed" to their conviction, Fahy v. Connecticut, supra, 375 U.S. at 86-7, the use at trial of that unconstitutionally obtained evidence against both the Gills was simply devestating.

To begin with, the unlawful seizure resulted in the introduction at trial of the clearest proof of the Gills' guilt - the nineteen pounds of marijuana and one pound of cocaine found

in the three bags in the kitchen (T5492-4, 5548-95, 5603-5). Expert testimony adduced by the government established that the value of this cache was approximately $25,000 (T6926-45, 7891-2). Surely, the introduction at trial of the only hard and indisputable evidence of drug distribution by the Gills- the nineteen pounds of marijuana and one pound of cocaine found in their apartment - "might have contributed" to their conviction and, therefore, is not harmless error.

In addition to the contraband itself, the government introduced at trial large quantities of material seized from the Gill apartment which revealed extensive narcotics dealings by them. Mere recital of those items makes inescapable the conclusion that they - aside from the three bags and their contents - "might have contributed" to the Gills conviction. They included: $73,000 in cash;* $72,500 in cancelled money

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* Included in this $73,000 was approximately $21,000 that had allegedly been offered by the Gills to the police as a bribe (T5622-4).

orders; various notebooks and papers; paraphernalia for distributing narcotics such as a scale, strainer, plastic bags and tin foil; safe deposit box keys; passports and a calculator (T5492-4, 5548-95, 5603-5, GX350, 350A, 350B, 351-8, 355A-D, 358A-E, 359-64). The safe deposit keys led to the seizure from safe deposit boxes which matched the keys of an additional $62,500 in cash and money orders (T5659-76, 5990-3).

Further, as discussed above, the unlawful search triggered the bribe offer by the Gills which statements were admitted at trial as proof of the Gills' consciousness of guilt of the narcotics charge in issue.

But even this recital of the introduction at trial of the unconstitutionally obtained evidence, physical and oral, does not convey fully the devestating use of this incriminating material by the government at trial.

In regard to the money order receipts seized from the Gill apartment, the government argued most effectively in summation that its proof revealed that these money orders had been deposited into the bank account of co-conspirator, Bruno Bravo, the same bank account into which money orders purchased by other co-conspirators had been deposited (T7852-3).

And, in regard to papers seized from the Gill apartment, a government agent testified that the notations on those papers were compilations of accounts of large narcotics

transactions with co-conspirators in the case (T6926-45, 7891-2). In summation, the government graphically illustrated this point by directing the jury's attention to enlargements that had been made of these papers (T7890-2, GX365).

Unquestionably then, analysis of the effect of the use of the unconstitutionally obtained evidence at the Gills' trial bars application of the harmless error rule to the substantial violations of their Fourth Amendment rights, and reversal of their conviction is required.

Further, in the event that this Court finds the seizure of the three bags unlawful, but seizure of the other items lawful, or conversely, finds the seizure of the three bags lawful, but seizure of the other items unlawful, still reversal is required. The foregoing analysis clearly reveals that introduction of the contents of the three bags at trial viewed separately from introduction of the other items seized from the Gills, "might have contributed to ... [their] conviction." Fahy v. Connecticut, supra, 375 U.S. at 86-7. And, similarly, introduction of all the other items seized from the Gill apartment, particularly the notebooks and the cancelled money order receipts, indisputably linking them to major drug transactions with other co-defendants in this case, "might have contributed to ... their conviction." ibid. Thus, viewed separately or in its entirety, these unlawful seizures compel reversal.

POINT II

THE MOTIONS BY DEFENDANTS CARMEN AND LIBARDO GILL SHOULD HAVE BEEN GRANTED IN VIEW OF THE GOVERNMENT'S PROOF, WHICH DEMONSTRATED MULTIPLE CONSPIRACIES.

The evidence against the Gills is summarized at pages 9 - 17 , supra. The facts relating to all defendants in this case are set forth in the joint brief filed on behalf of defendants Edgar Restrepo-Botero, Francisco Armendo-Sarmiento, Jorge Gonzalez, Ruben Dario Roldan, William Rodriguez-Parra, Olegario Montes-Gomez, Carmen Gill and Libardo Gill. For the reasons set forth in the joint brief, analysis of those facts reveals that the government proved multiple conspiracies rather than the single conspiracy charged in the indictment. Accordingly, the trial court erred in denying the motions by defendants Carmen and Libardo Gill for judgment of acquittal (T7067, 7074, 7750, 7753).

POINT III

PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, APPELLANTS CARMEN AND LIBARDO GILL ADOPT ALL RELEVANT POINTS RAISED BY THE CO-APPELLANTS

CONCLUSION

For all of the above reasons, the judgments of conviction of Carmen and Libardo Gill should be reversed and the indictment against them should be dismissed. In the alternative, they should be granted a new trial.

Respectfully submitted,

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Libardo Gill